62. Petition. AIDE states that applying competitive bidding and payment requirements in addition to existing financial qualification requirements disadvantages designated entities, who have historically been constrained by difficulties in capital formation and financing. AIDE recommends that short-form applications not require any certification of financial qualification. If an application became mutually exclusive, according to AIDE, the applicant's payment of its winning bid would demonstrate that it was financially qualified. If the application did not become mutually exclusive, then the applicant should have a short period in which to file any required demonstration of financial qualifications by amendment.[105]

63. Discussion. We believe that, in order to prevent the delay in bringing service to the public that might be occasioned by bankruptcies or by prolonged financial negotiations, it is important to require licensees to have the financial ability to construct and operate a system in addition to being able to purchase the license. Consequently we will continue to require applicants to certify on their short-form applications that they meet any existing financial qualification requirements of the services in which licenses are auctioned. We will not, however, impose additional showings of financial qualification as a part of the auction process.

IV. DESIGNATED ENTITIES

A. Introduction

64. Several provisions of the Budget Act address participation by small businesses, rural telephone companies, and businesses owned by women and minorities (referred to collectively as "designated entities") in the competitive bidding process and in the provision of spectrum-based services. Specifically, Section 309(j)(4)(D) of the Act, provides that, in prescribing competitive bidding regulations, the Commission shall, inter alia,

> ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . .[106]

In addition, section 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall seek to promote the objectives of "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone

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[105] AIDE Petition at 19-20.

[106] 47 U.S.C. § 309(j)(4)(D).

companies, and businesses owned by members of minority groups and women." To promote these objectives, section 309(j)(4)(A) expressly states that the Commission is required "to consider . . . alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods."[107]

65. In the Second Report and Order we adopted a broad menu of provisions that the Commission might employ to implement these statutory provisions. We adopted general provisions and eligibility rules designed to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women were afforded the opportunity to participate in both the competitive bidding process and in the provision of spectrum-based services. Specifically, we provided that small businesses (including those owned by women and/or minorities and rural telephone companies) that are winning bidders for certain blocks of spectrum could pay in installments over the term of their licenses. We also indicated that rural telephone companies may be eligible for bidding credits for licenses obtained in their service areas if they make an additional infrastructure build-out commitment beyond any existing performance requirements. We indicated that bidding credits may be available to designated entities on certain frequency blocks. In addition, we retained the option of establishing set-aside spectrum in certain services, in which eligibility to bid may be limited to some or all designated entities. Finally, we stated that we would consider the use of tax certificates as a means of creating incentives both for designated entities to attract capital from non-controlling investors and to encourage licensees to assign licenses to designated entities in post-auction transactions.

66. In the Second Report and Order we recognized that the provisions applicable to particular designated entities would vary depending on the nature of each individual service. For example, we retained the discretion to modify our general designated entity provisions for capital intensive services such as broadband PCS. In this regard, we stated that we would evaluate on a service-specific basis the capital requirements and other characteristics of the service to determine the appropriate provisions. We continue to believe that it is essential for the Commission to retain flexibility to select, and if necessary to modify, the general

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[107] See also 47 U.S.C. § 309(j)(4)(C)(ii), requiring the Commission, when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women"; section 309(j)(3)(A), establishing the objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; section 309(j)(12)(D)(iv), requiring that the Commission's 1997 report to Congress evaluate, inter alia, whether and to what extent "small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process."

designated entity provisions and eligibility requirements on a service-specific basis depending on the capital requirements and construction costs of the particular service.

B. Rural Telephone Company Definition

67. Background. In the Second Report and Order, we adopted a definition of "rural telephone company" that includes independently owned and operated local exchange carriers that (1) do not serve communities with more than 10,000 inhabitants in the licensed area, and (2) do not have more than 50,000 access lines, including all affiliates.[108] We stated our belief that a limitation on the size of eligible rural telephone companies was appropriate because Congress did not intend for us to provide special treatment to large LECs that happen to serve small rural communities.[109]

68. Petitions. Several parties filed petitions for reconsideration of the Second Report and Order requesting that we modify our standard definition for rural telephone companies. Petitioners' proposals include requests that the Commission amend its definition of "rural telephone company" (1) to expressly include municipal- and government-owned telephone companies within the "rural telephone company" definition in accordance with the earlier Senate version of the Budget Act;[110] (2) to define "rural telephone company" as a local exchange carrier with annual revenues of less than $100 million or serving no more than 100,000 access lines;[111] and (3) to include within the definition of "independently owned and operated" LECs that either operate 50,000 access lines or less or serve communities of 10,000 or fewer inhabitants.[112]

69. In addition, Blooston, Mordkofsky, Jackson & Dickens (Blooston) and South Dakota Networks, Inc. (SDN) request that the Commission eliminate the term "independently owned and operated" from the definition of "rural telephone company." According to Blooston, this restriction is unnecessary to prevent the largest telephone companies from taking advantage of provisions provided for rural telephone companies, since this same purpose is already served by the 50,000 access line limit, Blooston argues the Commission should amend its eligibility rules to indicate that they include the access lines of affiliates. Similarly, SDN indicates that the Commission should include "and affiliates" after "50,000 or fewer access lines" in the

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[108] 47 CFR § 1.2110(b)(3).

[109] See Second Report and Order at ¶282.

[110] See Anchorage Telephone Utility (ATU) Petition.

[111] See Petitions of The National Telephone Cooperative Association (NTCA), South Dakota Network, Inc. (SDN) and U.S. Intelco Networks, Inc. (USIN).

[112] See Petitions of the Rural Cellular Association (RCA) and SDN.

current definition. SDN maintains that the current language penalizes holding companies structured to permit telephone companies to offer paging and other nonregulated services.

70. The National Telephone Cooperative Association (NTCA) requests that the Commission amend the definition of rural telephone company to include any local exchange carrier with annual revenues of less than $100 million or serving no more than 100,000 access lines. NTCA also indicates that the term "independently owned" should not exclude small rural telephone companies that are affiliated with each other and that rural telephone company consortia should be permitted. USIN similarly advocates a "rural telephone company" definition based annual revenues of less than $100,000,000 or less than 100,000 access lines. According to USIN a revenue-based test is more accurate than net worth/net profit test.

71. The Rural Cellular Association (RCA), South Dakota Network, Inc. (SDN) and NTCA ask that the Commission amend the definition of rural telephone companies to include any independently owned and operated local exchange carriers ("LECs") that either operate 50,000 access lines or less or serve communities of 10,000 or fewer inhabitants. According to NCTA and RCA, the existing definition needlessly excludes many small independent telephone companies that serve rural areas. SDN alternatively requests that we revise the definition to include carriers with 100,000 or fewer access lines or up to $100 million in annual revenues.

72. Finally, Anchorage Telephone Utility (ATU) requests that the Commission modify the definition of rural telephone companies to include government-owned telephone companies. According to ATU, such a modification is necessary to achieve congressional intent. ATU notes that the Senate bill included municipally-owned telephone companies in its definition of rural telephone companies. ATU's argues that the Senate Bill mandates special consideration for rural telephone companies and directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies.[113] As evidence Congress' intent to include these provisions in the enacted version of Budget Act, ATU asserts that the Conference Report declares that the Senate's "findings" are incorporated by reference.

73. Oppositions and Replies. In its Comment on Petitions for Reconsideration, BET supports retention of the Commission's existing generic rural telephone company definition.[114] BET maintains that adoption of RCA's proposal to define rural telephone companies as LECs that have 50,000 access or fewer or serve communities with no more than 10,000 inhabitants will allow large LECs that "happen to serve rural areas" to qualify for designated entity provisions. In response to BET's Comments, RCA asserts that the "independently owned and

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[113] See ATU Petition at 2-3.

[114] BET Comments at 2.

operated" requirement for rural telephone company eligibility will prevent large LECs from qualifying for rural telephone company provisions. RCA also restates its request for an amendment to the general rural telephone company definition to include LECs that serve 100,000 access lines or fewer.[115]

74. In light of the Commission's decision in Fifth Report and Order in this proceeding, which adopted an alternative rural telephone company definition, NTCA argues that the Commission should abandon its generic rural telephone company definition and instead establish rural telephone company eligibility criteria on a service-specific basis. Alternatively NTCA proposes that we define rural telephone companies to include LECs that have annual revenues not in excess of $125 million or that serve no more than 100,000 access lines.[116] Tri-County Telephone Company, Inc. (Tri-County) supports SDN's proposed rural telephone company definition (50,000 access lines or serves no community with more than 10,000 inhabitants or alternatively 100,000 access lines or less).[117]

75. Discussion. We are persuaded by petitioner's arguments that the current generic "rural telephone company" definition is overly restrictive and effectively excludes many independently owned telephone companies that serve rural areas.[118] In the Fifth Report and Order we departed from our generic definition of rural telephone companies in the context of broadband PCS by adopting a definition that includes any local exchange carrier having 100,000 or fewer access lines, including all affiliates.[119] In adopting this definition of a "rural telephone company," we sought to achieve the congressional goal of promoting the rapid deployment of service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to use their wireline telephone networks to build infrastructures to serve rural America.[120] For purposes of our rules governing broadband PCS licenses, we indicated our belief that this goal could best be achieved if we defined "rural telephone companies" as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We concluded that this definition included virtually all telephone companies whose service areas are predominantly rural.

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[115] RCA Reply at 2.

[116] NTCA Reply Comments at 4.

[117] Tri-County Reply at 3.

[118] See RCA Petition at 4-5; USIN Petition at 10; NTCA Petition at 2.

[119] See Fifth Report and Order at ¶ 198.

[120] We also note that the unique technological requirements and the capital intensive nature of broadband PCS dictated that we adopt this definition of "rural telephone company."

76. For the foregoing reasons, we also believe that using the 100,000 access line definition as our standard rural telephone company definition will better serve our goals of encouraging the provision of service to rural areas than the definition previously adopted in the Second Report and Order. Accordingly, we will amend our standard definition of "rural telephone company" to include all local exchange carriers with 100,000 access lines or fewer, including affiliates. In general, we believe that this definition will more precisely capture those carriers that are truly rural in nature, while excluding the largest telephone carriers that do not face similar capital formation problems. We believe that this definition will also better achieve Congress' goal of fostering the development and rapid deployment of new technologies and services to rural areas by making special measures available to legitimate rural telephone companies that require such provisions in order to meaningfully participate in the provision of service to rural areas without giving such benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural telephone company provisions in each service where such provisions are established.[121]

77. As indicated above, Blooston, SDN and NTCA request that we eliminate the phrase "independently owned and operated" from the definition of "rural telephone company." These petitioners assert that the "independently owned and operated" restriction in the rural telephone company definition was intended to prevent large telephone companies from taking advantage of rural telephone company benefits, but that this purpose is served by the access line limit. In this regard, SDN argues that such language unduly penalizes holding companies of nonregulated services and entities created by groups of telephone companies to provide equal access, SS7, and other services.

78. We agree. The new 100,000 access line rural telephone company definition adopted above, includes the access lines of affiliates. Under the affiliation rules established in the context of broadband PCS, and adopted below as our generic affiliation rules, the access lines of holding companies, parent companies or affiliates of rural telephone companies that are not independently owned will be attributed for purposes of determining eligibility. This definition will capture most of the independently owned rural telephone companies, while excluding carriers affiliated with the largest LECs. In addition, we are concerned that the requirement that a rural telephone company must be independently owned would unnecessarily exclude rural telephone companies that are part of a holding company structure. Therefore we will delete the "independently owned and operated" requirement from our standard rural telephone company definition.

79. With respect to ATU's request that we amend our definition of rural telephone company to include municipal and government owned telephone companies that are owned by governmental authorities, we do not believe that such a change is warranted. ATU contends that Congress meant to mandate special consideration not only for telephone carriers serving

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[121] Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. See 47 CFR § 24.204(d)(2)(ii).

rural areas but also for all municipally-owned telephone companies, even those with wholly or predominantly urban service areas.[122] This argument is based on ATU's interpretation of the Senate bill which preceded the enacted Budget Act. ATU argues that the Senate bill containing the prototype of a mandate for special consideration for rural telephone companies directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies. ATU further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.[123] ATU also asserts that without the aid of special assistance it and most other state-owned and municipal telephone companies will not be able to purchase spectrum licenses at auction because it is politically infeasible for them to generate and retain enough surplus revenue to fund such investments, due to popular aversion to increases in taxes or telephone rates.[124]

80. As we indicated in the Fifth Report and Order, we are not persuaded by ATU's arguments.[125] We can find no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. In fact, the preceding bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill. To the contrary, the fact that an antecedent bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill could just as easily be interpreted as an indication that Congress rejected such a rule. We also disagree that state and municipal governments are without the means to participate successfully in auctions. As we noted in Fifth Report and Order such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation.[126]

C. Rural Telephone Company Consortia

81. Petitions. Telephone and Data Systems, Inc. (TDS) requests that the Commission relax the eligibility requirements for rural telephone company bidding consortia by (1) eliminating the 50,000 access line limit for rural telephone company consortium applicants; (2) allowing companies with more than 50,000 access lines, directly or through affiliates, to

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[122] ATU Petition at 2-3.

[123] Id.

[124] Id. at 4-5.

[125] See Fifth Report and Order at ¶203.

[126] See Fifth Report and Order at ¶ 200. In any event, most state and municipally owned telephone systems (although not ATU) will be captured by our new 100,000 access line rural telephone company definition.

participate in rural telephone company consortia by demonstrating that more than 50 percent of their access lines company-wide (including affiliates) and over 50 percent of those in the proposed service area serve only communities with 10,000 or fewer inhabitants and (3) providing that all rural telephone companies in consortia with 50,000 access lines or less have the right to hold up to 60 percent of the equity in the consortium. SDN and NTCA also argue that the Commission should allow rural telephone companies to form consortia, since combining telephone companies would not alter their rural nature, so long as the rural telephone company retains at least 50.1percent equity and control.

82. USIN similarly requests that small businesses, including rural telephone companies, be allowed to qualify for special provisions if they pool their resources into consortia, provided such consortia are controlled by designated entities. According to USIN, if such consortia are not permitted, rural telephone companies and other small businesses may be foreclosed from participation in the auction process and in the provision of auctionable services. USIN also indicates that efficiencies and economies of scale are created by aggregation and thus special measures should be provided to these entities who may be able to provide service most efficiently.

83. Discussion. We deny the requests of TDS, SDN,[127] and NTCA that we modify the standard definition of rural telephone company to eliminate or relax the access line limit for rural telephone company consortia. In the Second Report and Order as a general matter, we declined to provide exceptions to our designated entity eligibility criteria for applicants that are consortia of various individual entities, which in combination fail to qualify as designated entities.[128] We found that such combinations, if they deviate from our standard definitions of designated entities, should not be eligible for provisions expressly designed for designated entities. This conclusion was based on our desire to provide economic opportunity to those entities designated in the statute and to ensure such entities the opportunity to provide spectrum-based services. We concluded that establishing exceptions to our definitions for consortia (even those wholly comprised of otherwise qualified designated entities) would undermine this objective by diluting the economic opportunity for individual qualified designated entities. We also found that allowing applicants to be formed from a combination of eligible and ineligible entities would invite attempts to abuse the designated entity provisions by those not entitled to them.

84. However, in the Second Report and Order we noted that we may determine on a service-specific basis to allow a designated entity consortium to receive other benefits based

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[127] SDN argues that the Commission should allow rural telephone companies to form consortia among themselves, since combining telephone companies does not alter their rural nature. SDN also argues that consortia with investors should be permitted so long as the rural telephone company retains at least 50.1 percent equity and control. SDN Petition at ¶¶ 20-23.

[128] See Second Report and Order at ¶ 286.

on equity and operational participation in the consortium by one or more designated entities. We retained the flexibility to enable designated entity consortia to qualify for special provisions particularly where the capital costs of a particular service are high and the formation of consortia is thus essential to foster investment in designated entity ventures and to enable such entities to compete in the provision of such service. In this regard, in the Fifth Report and Order we allowed consortia comprised of small businesses to qualify for all of the measures applicable to individual small businesses provided each member of the consortium individually satisfies the definition of a small business. We found that given the "exceptionally large capital requirements" associated with broadband PCS, allowing small businesses to pool their resources in this manner was necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors.

85. As a general matter, we will continue to determine whether to permit designated entities to receive benefits based on their participation in consortia on a service-specific basis, depending on the capital requirements and other characteristics of the particular service. We modify the Second Report and Order, however, to provide that consortia may be permitted to qualify for any designated entity provisions (where each member individually meets the eligibility requirements) on a service-specific basis, where the capital requirements of the service are high. Where, as in broadband PCS, we find that the capital requirements necessitate allowing designated entities to pool their resources to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and in the provision of service, we may adopt rules allowing such consortia to qualify for designated entity provisions.

D. Affiliation Rules

86. Petitions. Blooston and NTCA request that the Commission clarify the meaning of "affiliate" for purposes of access line aggregation. According to Blooston, passive investments by a rural telephone holding company in other telephone companies should not preclude eligibility for rural telephone company status, so long as there is no common control between the rural telephone company and the other carrier. Blooston reasons that the common control definition is used in the auction rules for small businesses' affiliates, has been used by the Commission when defining connecting carriers, and is generally used by the financial community and the Securities and Exchange Commission. Finally, Blooston requests that the Commission amend its designated entity provisions to allow rural telephone companies to combine into consortia and partner with investors without losing designated entity status so long as the majority equity control resides with members who are rural telephone companies. NTCA similarly requests that the term "affiliates" be clarified to indicate what organizational structures are permitted.

87. Discussion. In response to the requests of NTCA and Blooston that we clarify the meaning of the term affiliate to indicate the types of organizational structures that will be included, we amend the Second Report and Order to establish as our standard affiliation rules

the same affiliation rules adopted by the Commission in the Fifth Report and Order.[129] Blooston specifically requests that we clarify the meaning of "affiliate" so that passive investments by a rural telephone company in other rural telephone companies do not preclude designated entity status if there is no common control. As described more fully below, under our affiliation rules a passive interest in another telephone company, which does not constitute control of that company would not be considered an affiliation for purposes of access line aggregation.

88. In the Second Report and Order, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the Fifth Report and Order we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for broadband PCS to be used in the context of determining designated entity eligibility where our criteria are based on the size of the entity seeking special treatment and require applicants to include "affiliates" when calculating their eligibility. These affiliation requirements are intended to prevent entities that do not meet these size standards from receiving benefits targeted to smaller entities.[130] We believe that these rules are appropriate for determining affiliations generally, and therefore we will incorporate these standards into our generic auction rules for purposes of determining all size-based eligibility requirements. We summarize these standards below.

89. Where we adopt sized-based eligibility rules and provide that such eligibility determinations shall include the applicant and all its "affiliates," the following rules shall govern determinations regarding affiliation. Apart from determining affiliation between the applicant itself and outside entities, the need to determine affiliation arises where an investor has an attributable interest in a designated entity.[131] In this context it is necessary for the Commission to examine whether such investor has a relationship with other persons or outside entities that rise to the level of an affiliation with the applicant, and if so, whether the affiliate's assets, revenues, net worth, number of access lines, or other applicable financial thresholds, when aggregated with the applicant's, exceed the Commission's size eligibility thresholds.

90. General Principles of Affiliation. An affiliation under the SBA rules would arise, first, from "control" of an entity or the "power to control it." Thus, under the SBA rules, entities are affiliates of each other when either directly or indirectly (i) one concern controls

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[129] See Fifth Report and Order at ¶¶ 201-217.

[130] See, e.g., Second Report and Order at ¶ 272.

[131] In the context of broadband PCS, we stated that, generally, investors owning more than 25 percent of the applicant's passive equity would be considered to have "attributable" interests. See Fifth Report and Order at ¶ 158. With regard to IVDS, we used the SBA standard to determine attributable interests, i.e., control.

or has the power to control the other, or (ii) a third party or parties controls or has the power to control both.[132] In determining control, the SBA's rules provide generally that every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. The rules, in addition, provide specific examples of where control resides under various scenarios, such as through stock ownership or occupancy of director, officer or management positions. The rules also articulate general principles of control, and note, for example, that control may be affirmative or negative and that it is immaterial whether control is exercised so long as the power to control exists.[133] Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties.[134] We adopted these same general provisions as our affiliation rules for broadband PCS and will also incorporate them into our general affiliation rules.

91. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our service specific attribution rules. For example, in the context of broadband PCS, our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of certain passive investors, provided that an eligible control group has de facto and de jure control of the applicant.[135] Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has de facto and de jure control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.

92. Applying these SBA affiliation rules, an affiliation would arise, for example, where an entity with an attributable interest in an applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in an applicant controls, or has the power to control, another entity. For example, if an attributable investor in an applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the applicant as a result of the shareholder's ownership interest in both entities? Under the SBA rules and the rules we adopt here, Corporation X would be deemed an affiliate of the applicant if the shareholder controlled or had the power to control

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[132] 13 CFR § 121.401(a)(2)(i), (ii).

[133] Id. § 121.401(c)(1).

[134] Id. § 121.401(a)(2)(iii), (d).

[135] See Fifth Report and Order at ¶ 205.

Corporation X, in which case, Corporation X's gross revenues must be included in determining the applicant's gross revenues.[136]

93. For purposes of determining control, ownership interests will be calculated on a fully-diluted basis. Thus, for example, stock options, convertible debentures, and agreements to merge (including agreements in principle) will generally be considered to have a present effect on the power to control or own an interest in either an outside entity or the PCS applicant or licensee. We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.[137] However, an affiliate cannot use such options and debentures to appear to terminate its control over or relationship with another concern before it actually does so.[138]

94. Voting and Other Trusts. In a similar vein, we also borrow from the SBA's rules and our own rules in other services to find affiliation under certain voting trusts in order to prevent a circumvention of eligibility rules. The SBA's rules provide that a voting trust, or similar agreement, cannot be used to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control an outside concern, if the primary purpose of the trust is to meet size eligibility rules.[139] Similarly, under the Commission's broadcast multiple ownership rules, stock interests held in trust may be attributed to any person who holds or shares the power to vote such stock, has the sole power

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[136] See Fifth Report and Order at ¶ 206.

[137] See 13 C.F.R § 121.401(f). SBA's rules provide the following examples to guide the application of this provision:

> Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The [annual revenues] of both concerns must be taken into account in determining size.
> Example 2. If company "A" has entered into an agreement to merge with company "B" in the future, the situation is treated as though the merger has taken place. [A and B are affiliates of each other].

[138] Id. SBA's rules provide this example:

> If large company "A" holds 70 percent (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 66 of the 70 shares owned by A, company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which [gives] present effect to stock options, the option is not considered to have present effect in this case.

[139] 13 CFR § 121.401(g).

to sell such stock, has the right to revoke the trust at will or to replace the trustee at will.[140] Also, under the broadcast rules, if a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary of a trust, the stock interests held in trust will be considered assets of the grantor or beneficiary, as appropriate.[141] Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the general affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in an applicant holds a beneficial interest in stock of another firm that amounts to a controlling interest in that other firm, depending on the identity of the trustee, the other firm may be considered an affiliate and its assets and gross revenues may be attributed to the applicant.

95. Officers, Directors and Key Employees. Under the SBA's affiliation rules, which we adopt as our generic approach, affiliations also generally arise where persons serve as the officers, directors or key employees of another concern and they represent a majority or controlling element of that other concern's board of directors and/or management of the outside entity.[142] Thus, if a person with an attributable interest in an applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. Such affiliations may or may not result in the applicant's exceeding our size limitations. As this rule reflects, for purposes of attributing the financial position of an outside entity in this context, officers and directors of an outside concern are not foreclosed entirely from holding attributable or non-attributable interests in an applicant. Whether or not such persons control the outside entity, we also do not want to prohibit these persons, who may be experienced in the telecommunications, finance, or communications and equipment industries, from assisting start-up companies by serving as officers or directors of the applicant. Thus, if such persons serving as officers or directors of the applicant do not control the applicant or otherwise have an attributable interest in the applicant, their outside affiliations (even if controlling) will not be considered at all for purposes of determining the applicant's eligibility under our rules.[143]

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[140] See 47 CFR § 73.3555 note 2(e).

[141] Id.

[142] See 13 CFR § 121.401(h). A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. 13 CFR § 121.405.

[143] SBA's size standard affiliation rules also provide that affiliations can arise in a variety of other scenarios, such as where one concern is dependent upon another for contracts and business, where firms share joint facilities, or have joint venture or franchise license agreements. To the extent we believe these rules may have general applicability we shall codify them in our affiliate rules. We caution parties that issues relating to de facto control of the applicant (or parties with attributable interests in the applicant) could also arise under arrangements not expressly codified in the rules.

96. Affiliation Through Identity of Interest: Family and Spousal Relationships. Consistent with the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties.[144] For example, affiliation can arise between or among members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control an entity, persons with an identity of interest may be treated as though they were one person.[145] For example, if two shareholders in Corporation X are both attributable shareholders in an applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

97. Similarly, as under the SBA rules, we will consider spousal and other family relationships in determining whether an affiliation exists. Under the SBA rules for determining small business status, for example, members of the same family may be treated as though they were one person because they have an "identity of interest."[146] Likewise, in order to determine whether individuals are economically disadvantaged, the SBA rules governing eligibility for participation in the government's "section 8(a)" program for socially and economically disadvantaged small businesses have special provisions for attributing spousal interests. The latter rules provide generally that half of the jointly-owned interests of an applicant and his or her spouse must be attributed to the applicant for purposes of determining the applicant's net worth.[147]

98. In the context of auction size-based eligibility standards at issue here, we begin by clarifying that our reason for considering spousal and kinship relationships is not to determine whether the spouse or other kin of a women-owned applicant actually is controlling the applicant, thereby violating our eligibility rules for woman-owned businesses. Our rules do not embody any presumptions concerning spousal control in that context. Rather, our objective here is to ensure both that entities are actually in need of the assistance provided by our rules and that entities otherwise ineligible under applicable size criteria do not circumvent the rules by funding family members that purport to be eligible applicants.

99. In formulating these rules, we need to consider also that, as a practical matter, it will not be possible for us prior to the auctions to resolve all questions that pertain to the individual circumstances of particular applicants. Furthermore, if we determine subsequent to an auction that a winning bidder in fact was ineligible to bid or to benefit from special provisions, such as bidding credits, because of spousal or kinship relationships, not only will authorization of service be delayed but, as discussed above, disqualified applicants may be

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[144] See 13 CFR § 121.401(a)(2)(iii).

[145] Id. at § 121.401(d).

[146] 13 CFR § 121.401(d).

[147] See 13 CFR § 124.106(a)(2)(i)(A)(1).

subject to substantial penalties. In these circumstances, we think that the public interest requires that we endeavor, insofar as possible, to establish bright-line tests for determining when the financial interests of spouses and other kin should be attributed to the applicant.

100. We have decided that, for purposes of determining whether the financial limitations in our eligibility rules have been met, we will in every instance attribute the financial interests of an applicant's spouse to the applicant. This will resolve any concern that an applicant might transfer his or her assets to a spouse in order to satisfy the financial restrictions that apply to eligible entities. For example, an applicant could not transfer stock or other assets to his or her spouse and thereby dispose of interests that, if held by the applicant, would render the applicant ineligible. Just as importantly, this approach will resolve any concern that an applicant might participate in bidding by using the personal assets of an ineligible spouse, which would defeat entirely the objective of providing special financial measures for designated entities.

101. In adopting this rule, we fully recognize that instances could arise in which, if all factors were considered, attributing a spouse's financial interests to the applicant could lead to harsh results. As a general matter, however, we think it provides a workable bright-line standard that resolves fully our policy concerns and avoids undesirable ambiguity concerning the nature of our requirements. As in the SBA rules, however, one exception is clearly warranted; this affiliation standard would not apply if the applicant and his or her spouse are subject to a legal separation recognized by a court of competent jurisdiction. In calculating their personal net worth, for example, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

102. As indicated above, circumstances could also arise in which other kinship relationships are used as a means to evade our eligibility requirements. Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the "identity of interests" that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants. In this area, we shall follow the same standard that is applied by the SBA when interpreting its "identity of interest" rule described above. Specifically, an identity of interests between family members and applicants will be presumed to exist, but the presumption can be rebutted by showing that the family members are estranged, or that their family ties are remote, or that the family members are not closely related in business matters.[148] For purposes of determining who is a family member under this rule, we shall use a definition that is identical to the definition of "immediate family member" in the SBA's rules, 13 CFR § 124.100.

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[148] See generally Texas-Capital Contractors, Inc. v. Abdnor, 933 F.2d 261 (5th Cir. 1990).

103. In appropriate cases, an applicant should be able to rebut the presumption regarding kinship affiliations with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members. Of course, should such business relationships arise with a winning applicant after the auction, we might need to consider whether the applicant intended to circumvent the requirements of our eligibility rules.

104. The affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet the size standard required for eligibility from receiving benefits targeted to smaller entities.[149] We believe that the affiliation rules described above will accomplish this objective.

E. Rural Telephone Company Bidding Credits.

105. Petitions. NCTA, USIN and SDN argue that the FCC should retain the rural telephone company bidding credit provision adopted in the Second Report and Order but delete the accelerated build-out requirement as a condition for receipt of bidding credits. USIN asserts that bidding credits will not help attract capital when tied to such an expanded build-out requirement. According to USIN, making bidding credits contingent on an accelerated build-out effectively nullifies the provision because the commitment of additional capital for network build-out will reduce the amount available to finance the license price by enough to offset any benefit conferred by the availability of the credit.[150] SDN agrees that additional build-out should not be required as a prerequisite for rural telephone company bidding credits, but states that a rural telephone company should receive additional bidding credits if it substantially covers its certified rural service area during its license term.[151] NTCA argues that the accelerated build-out requirement for bidding credits should be eliminated since this requirement is unrelated to the statutory purpose of promoting investment in and rapid deployment of new technologies and services in rural areas.[152]

106. SDN also contends that the risk of forfeiting the bidding credit (plus interest) for failure to meet the expanded build-out commitment will have a chilling effect because of the difficulty of anticipating potential problems that may be encountered in attempting to extend service rapidly to remote areas. Further, SDN maintains that an accelerated build-out requirement could engender a perverse incentive for a rural telephone company that would otherwise concentrate primarily on providing PCS service in the rural portions of a BTA or MTA (which, according to SDN might be a commercially-attractive strategy because of

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[149] See, e.g., Second Report and Order at ¶ 272.

[150] USIN Petition at 12.

[151] SDN Petition at 14.

[152] See 47 U.S.C. § 309(j)(3)(A).

steeper competition in urban areas), forcing it to concentrate instead on extending its network in densely-populated areas.[153]

107. Finally, SDN and USIN contend that it is inequitable to provide rural telephone companies with a less favorable bidding credit provision than other designated entities. In this regard, USIN argues that the Second Report and Order fails to explain why rural telephone company bidding credits should contain more restrictive terms than other designated entity bidding credits. On the contrary, SDN contends that rural telephone companies should receive a greater bidding credit than other entities, because they face higher service and construction costs. Accordingly, SDN maintains that if accelerated build-out is to be included in the rural telephone company provision, an incentive should be provided in the form of bonus credit over and above the standard bidding credit available to other designated entities.

108. Discussion. In the Second Report and Order we adopted a system of bidding credits for rural telephone companies designed to further promote the investment in and rapid deployment of new technologies and services in rural areas.[154] We generally concluded that any special measures adopted for rural telephone companies, including bidding credits, should be limited to bidding for licenses in their rural service areas. We found that this limitation satisfied Congress's objectives without unduly favoring rural telephone companies in markets where there was no compelling reason to do so. Specifically, we concluded that Congress was primarily concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities.[155] Accordingly, we provided that rural telephone companies would be eligible for bidding credits for specified licenses only in their service areas.

109. However, unlike bidding credits available to women and minority-owned firms, we linked the amount of the bidding credit for rural telephone companies to their commitment to achieve certain expanded infrastructure build-out requirements in their rural service areas. We provided that the amount of the bidding credit would be proportionately linked to the amount by which the rural telephone company agreed to expand its build-out commitment. In this regard, we indicated that failure to meet the expanded build-out commitment would result in liability for a penalty in the amount of the bidding credit, plus interest at the rate applicable to installment payments. We further provided that grant of the licenses to rural telephone companies utilizing bidding credits would be conditioned upon payment of this penalty, if and when it becomes applicable. We concluded that this added construction requirement would

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[153] SDN Petition at 14-15.

[154] See 47 U.S.C. § 309(j)(3)(A).

[155] Second Report and Order at ¶ 243.

fulfill the congressional objective of developing and rapidly deploying new services to those residing in rural areas.

110. On reconsideration of this issue, we no longer believe the provision in the Second Report and Order,which links the availability of bidding credits for rural telephone companies to their agreement to satisfy an expanded construction requirement, is necessary or appropriate to promote the statutory objectives. We agree with petitioners' assertions that the expanded build-out requirement may have adverse consequences contrary to the purpose of bidding credit provision. We are also concerned that the expanded construction requirement may be unduly burdensome both to rural telephone company licensees and the Commission. In this regard, we are concerned that the accelerated build-out requirement may not be economically feasible in some rural areas and thus may result in frequent forfeitures of the bidding credit amount by rural telephone companies. As discussed more fully below, we now believe that Congress' objectives of promoting investment in and rapid deployment of new technologies and services to rural areas will best be achieved through the use of other provisions such as installment payments, bidding credits (without an expanded build out requirement), and service area partitioning. Thus, we amend our rules to retain flexibility to adopt any of these or other provisions for rural telephone companies on a service-specific basis after considering the characteristics and capital requirements of the particular service.

F. Rural Telephone Company Eligibility for Installment Payments

111. Petitions. SDN, USIN, and NCTA all request that installment payments be extended to rural telephone companies regardless of their status as small businesses. AIDE and Cook Inlet argue that all designated entities should be permitted to pay for their licenses in installment payments irrespective of their size. These parties all object to the decision to limit eligibility for installment payments to small businesses as defined in §1.2110(b)(1), (i.e., companies with net worth including that of affiliates of $6 million or less and no more than $2 million of annual after-federal-tax profit for the last two years). USIN argues that there is no statutory support in the provisions cited by the Commission as authority for adopting different provisions for one designated entity group as opposed to another.

112. Citing the legislative history to the Budget Act and H.R. Report No. 103-111 in particular, USIN also maintains that the statutory purpose of requiring special provisions for designated entities was to promote entry by firms with difficulty in obtaining access to capital. Petitioners maintain that the $6 million net worth/$2 million net revenue standard for installment payment eligibility is too strict and will prevent rural telephone companies from qualifying for the installment payment option although they face significant difficulty in obtaining access to capital. USIN asserts that as a practical matter rural telephone companies may have high levels of non-amortized assets and yet have less capital available for investment than many businesses that meet the small business definition. SDN maintains that rural telephone companies should be eligible for installment payments regardless of whether they qualify as small businesses because they will generally incur higher build out costs with lower revenue streams than other designated entities. According to USIN, a rural telephone

company bidding for a license in a capital-intensive service should be eligible for installment payments if its annual revenue are under $100 million USIN asserts that without installment payments such telephone companies will be unable to bid for broad-coverage licenses as traditional rural telephone company lenders have indicated unwillingness to finance auction bids.

113. AIDE objects to the determination in the Second Report and Order that limits the installment payment option to small businesses bidding on licenses for "those smaller spectrum blocks that are most likely to match the business objectives of bona fide small businesses."[156] According to AIDE, such the installment payment option should be available to all designated entities bidding on all licenses. AIDE maintains that Congress did not intend to give the FCC discretion to offer special provisions to some designated entities in some auctions but not in others. AIDE argues, moreover, that these limitations on the availability of installment payments are not justified by the Commission's desire to prevent abuse of its designated entity provisions since there are other safeguards designed specifically for that purpose, such as the rules for disclosure of real parties in interest, the definitional requirements including the assets of affiliates and the financial qualification rules.

114. Discussion. For the reasons set forth below, we deny petitioners' requests to expand the installment payment option to other designated entities irrespective of their economic status. However, we will retain the flexibility to expand or modify the installment payment option on a service-specific basis for other appropriately-sized entities where the spectrum costs and capital infrastructure requirements necessitate their application to other entities. For example, in the Fifth Report and Order we recognized that the substantial expected capital required to acquire and construct broadband PCS licenses warranted expansion of the installment payment option to most entities acquiring licenses in the entrepreneurs' blocks.[157] Under the broadband PCS rules, installment payments are available to smaller entities that do not technically qualify as small businesses and an enhanced installment payment option is available to eligible small businesses and businesses owned by women and/or minorities.

115. In the Second Report and Order, we concluded that for some auctions, small businesses would be eligible for installment payments. We noted that by allowing payment in installments, the government would be extending credit to an eligible winning bidder, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. We noted that this will assist small entities who are likely to have difficulty obtaining adequate private financing. As a result, we concluded that installment payments would be an effective way to promote efficiently the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently

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[156] See Second Report and Order at ¶ 237.

[157] See Fifth Report and Order at ¶¶ 136-140.

distributing licenses and services among geographic areas.[158] Thus, we limited application of installment payments to small entities, including such entities that are owned by minorities and/or women. We found that this approach best served the intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups.[159]

116. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments for minorities and/or women also were intended to assist only minorities and women who are small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."[160] (emphasis added). It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."[161] Because the Congressional objective here was to assist "new companies or start-ups," we therefore concluded that the Commission should use installment payments only for smaller sized entities. As indicated by the legislative history, large entities with established revenue streams were not intended to be beneficiaries of this particular means of financial assistance. We concluded that the statutory language, when read in conjunction with the legislative history, does not indicate that Congress's purpose was to accord special financial assistance measures under section 309(j)(4)(A) to entities other than those with small economic status.[162] In this regard, we reject petitioner's proposals to allow installment payments for rural telephone companies or other designated entities irrespective of their size. We will continue to determine on a service-specific basis the appropriate economic eligibility criteria for installment payments. And we may, as we did in the context of broadband PCS, establish different installment payment options for entities who face different economic barriers.

117. In addition, and consistent with our decision to limit installment payments to small entities, we decline to make installment payments available for all licenses in all auctions. Rather, in order to match the provisions with eligible recipients, we will continue to make

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[158] See Second Report and Order at ¶¶ 233-240.

[159] See H.R. Rep. No. 103-111 at 255.

[160] Id.

[161] Id.

[162] Under authority of Section 309(j)(4))(D), we have, however, afforded other types of financial assistance measures, such as bidding credits, to other designated entities. See e.g., Third Report and Order , in PP Docket No. 92-253, 59 FR 26741 (May 24, 1994), at ¶¶ 72-81 (which provides bidding credits to businesses owned by minorities and/or women).

installment payments available only for certain licenses that do not involve the largest spectrum blocks and service areas. In this regard, in the context of narrowband PCS, we adopted installment payments only for the regional, MTA and BTA licenses. Similarly, for broadband PCS, we limited eligibility for installment payments to the BTA licenses contained in the entrepreneurs' blocks. We continue to believe that where large, valuable blocks of spectrum are being auctioned we should not give ineligible entities the incentive to create small business "fronts," thereby enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they may lack the resources adequately to finance.[163] Accordingly, we will continue to allow installment payments only for licenses in those smaller spectrum blocks and service areas that are most likely to match the business objectives of bona fide small entities in the context of a particular service. The particular spectrum block sizes that will be eligible for installment payments will be decided in the context of each particular service taking into account the cost of acquiring the spectrum and constructing the system.

G. Rural Telephone Company Partitioning

118. Petitions. SDN requests that rural telephone companies be allowed to partition their rural service areas either pursuant to an agreement with the BTA or MTA licensee, or by licensing a separate PCS service area using a system similar to the cellular unserved area application process.[164]

119. Several commenters responding to the NPRM in this proceeding suggested that the Commission allow partitioning of PCS licenses so as to permit rural telephone companies to hold licenses to provide service only in their service areas.[165] In the Second Report and Order we recognized that partitioning may be an effective means to achieve Congress's goal of ensuring that advanced services are provided in rural areas.[166] In the context of broadband PCS, we adopted a system of geographic partitioning, for rural telephone companies which allows rural telephone companies to acquire partitioned broadband PCS licenses in one of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants, or (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction (provided the partitioned area is reasonably related to the size of the rural

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[163] See 47 U.S.C. § 309(j)(3)(A).

[164] See SDN Petition at 7.

[165] See, e.g., comments of GVNW at 2-4, and NTCA at 13.

[166] See Second Report and Order at ¶ 243 n. 186.

telephone company's rural service area).[167] We require that partitioned areas conform to established geopolitical boundaries and that each area include the wireline service area of the rural telephone company applicant. We believe that this system of partitioning of rural service areas will provide a significant opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. Therefore, we will retain the flexibility in the generic auction rules to adopt a system of partitioning on a service-specific basis where the capital requirements and construction costs are such that a system is necessary to assist rural telephone companies who cannot afford or do not desire to bid for or construct systems for an entire service area.[168]

H. Unjust Enrichment Provisions

120. Petitions. AIDE requests that when the Commission recaptures the benefits accruing to a designated entity pursuant to the unjust enrichment provisions, the unjust enrichment penalty should credit the licensee's pre-sale investments in the license and should be based on the portion of the licensee's taxable gain on the sale allocated to the license, with appropriate adjustments. BET similarly requests that the Commission revise the unjust enrichment provisions to credit the designated entity for its pre-transfer expenditures on the license including construction costs.

121. Discussion. We deny the requests of AIDE and BET. In the Second Report and Order the Commission crafted unjust enrichment provisions designed to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of provisions and policies meant to encourage their participation in the provision of spectrum-based services. These rules were intended to deter designated entities from prematurely transferring licenses obtained through the benefit of provisions designed to create opportunities for such designated entities in the provision of spectrum-based services. We sought through our unjust enrichment provisions to discourage designated entities who do not intend to provide service to the public from abusing our provisions by obtaining a license at a lower cost than other licensees and then selling the license after a short time to a non-designated entity at a profit. In addition, the unjust enrichment rules were intended to recapture for the government a portion of the value of the bidding credit or other special provision if such a designated entity prematurely transfers its licenses to an ineligible entity, thereby frustrating the government's efforts to encourage the inclusion of designated entities in the provision of new spectrum-based services.

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[167] See Fifth Report and Order at ¶152.

[168] In a Further Notice of Proposed Rulemaking in this docket, the Commission will also explore the merits of allowing businesses owned by minorities and/or women to acquire partitioned PCS licenses, as well as partitioned licenses in other services.

122. We recognize that over time, a designated licensee may have made substantial investments in a license prior to transfer. In order to reward efficiency and encourage such investments in infrastructure development, we provided that we will generally reduce the amount of the recapture penalty as time passes or construction benchmarks are met.[169] We further provided that our recapture provisions would not apply to the transfer or assignment of a license that has been held for more than five years.[170] In addition, where a recapture penalty is assessed, we stated that the penalty will not prevent the transferring designated entity from recovering the depreciated value of its capital investment. Moreover, we indicated that in appropriate circumstances, we might waive recapture "if the licensee has incurred substantial start-up costs or made significant capital investments with the intention of starting service, but due to circumstances beyond its control, was unable to provide service."[171]

123. We believe that these measures adequately account for a designated entity's pre-transfer investments in a license, including construction expenses. Therefore, we decline to adopt AIDE's proposal that we credit the licensee's pre-sale investments in the license and base the recapture amount on the portion of the licensee's taxable gain on the sale allocated to the license, because such provisions would require the government to undertake lengthy and complex accounting and allocation proceedings to determine the amount of the penalty. Similarly, we deny BET's request that we credit designated entities for their pre-transfer expenditures on a license because we believe that our recapture provisions adequately account for these expenditures by reducing the amount of the penalty over time. Moreover, the unjust enrichment provisions were designed to act as a penalty to deter premature license transfers by designated entities. Therefore we decline to modify the recapture provisions adopted in the Second Report and Order. We note, however, that because license terms and construction requirements vary by service, and because we may adopt different designated entity provisions for different services, we will set forth the specific recapture provisions in the service-specific competitive bidding rules of each auctionable service. Moreover, we modify our general recapture provisions to provide flexibility on a service-specific basis to extend the duration of the recapture provisions beyond five years.

I. Upfront Payment Amount

124. Petitions. AIDE requests that the Commission reduce the amount of the upfront payment for designated entities. AIDE asserts that a reduced upfront payment would help ensure that capital constrained designated entities have the opportunity to participate in the competitive bidding process. According to AIDE, a reduced upfront payment is necessary to create opportunities for designated entities to participate in competitive bidding and will allow such entities to preserve their limited resources for post-auction infrastructure development.

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[169] See Second Report and Order at ¶ 262.

[170] Id.

[171] Id. at n.205.

125. Discussion. The Commission adopted an upfront payment requirement in order to ensure that only serious, qualified bidders participate in our auctions. We reasoned that an upfront payment requirement would ensure the validity of the information generated during auctions and increase the likelihood that licenses will be awarded to the qualified bidders who value them the most, thus promoting the rapid deployment of new technology. Upfront payments will also provide the Commission with a source of available funds in the event a bid withdrawal penalty must be assessed. By requiring a substantial upfront payment amount, the Commission seeks to deter speculative and frivolous bidding by all bidders, including designated entities. Moreover, the standard upfront payment formula ($.02 per MHz per pop for the maximum MHz-pops a bidder intends to bid on in any single round of bidding), is based on the amount of spectrum and population coverage on which a bidder seeks to bid and therefore is directly linked to the expected value of the license and anticipated construction costs a licensee will incur.

126. Nevertheless, in the Second Report and Order we retained the flexibility to cap, reduce or modify the upfront payment amount for designated entities.[172] We indicated that such decisions would be made in the service-specific competitive bidding rules for individual services. In the Fifth Report and Order, recognizing that the standard upfront payment formula may create a barrier for smaller entities wishing to participate in auctions, we reduced by 25 percent the upfront payment amount required for designated entities bidding in the entrepreneur's blocks.[173] Given the varied spectrum costs of different services, we will continue to consider such reduced upfront payments for designated entities on a service-specific basis. Generally, we will only reduce the upfront payment amounts for designated entities in capital intensive services, such as broadband PCS, where the spectrum bandwidth will result in upfront payment amounts that may be prohibitive for some smaller entities.

J. Installment Payments

127. In the Second Report and Order, we stated that, for some auctions, winning bidders that are small businesses would be eligible to use installment payments in paying for licenses.[174] We provided that for these winning bidders, a down payment of 10 percent would be due within five business days of the close of the auction, and that an additional 10 percent would be due within five days of grant of the license.[175] We stated that we would impose interest on installment payments at a rate equal to the rate for U.S. Treasury obligations of maturity equal to the license term. We stated that the schedule of installment payments would

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[172] See Second Report and Order at ¶ 178 n.37.

[173] See Fifth Report and Order at ¶ 156.

[174] Id. at ¶ 233.

[175] Id. at ¶ 238.

begin with interest-only payments for the first two years, and that thereafter principal and interest would be amortized over the remaining term of the license.[176]

128. Upon reconsideration, we have decided that we may need to tailor installment payment provisions more precisely to needs of various groups of designated entities and the characteristics of particular services. In the Fifth Report and Order we provided installment payments for minorities and women in some blocks, and provided different installment provisions for small businesses of different sizes.[177] We will continue to establish different installment payment provisions on a service-specific basis. We may offer installment payments to minorities and women, in some circumstances, and may offer installment payments having differing terms to different classes of designated entities. We may vary the interest rate and the payment schedule for installment payments, including the amount and timing of the down payment and the schedule for amortization of principal and interest. Installment payment provisions for each service will be specified in Orders establishing auction rules for that service. We believe that this additional flexibility will allow us to take account of differences in capital requirements across services and license blocks, and to provide access to capital in ways that will give various groups of designated entities a realistic chance to participate in offering service.

K. Eligibility Issues

129. Petitions. Black Entertainment Television Holdings, Inc. (BET) requests that the FCC reconsider the public company restriction on the availability of provisions for minority and women-owned companies in broadband PCS. BET argues that given the costs of acquiring spectrum and the construction expense, such a limitation would defeat realistic opportunities for a wide range of minority-owned firms. BET also requests that we clarify that provisions for minority and women-owned firms are separate and distinct from provisions for small businesses. Finally, BET argues that rights, privileges, options or other forms of ownership that do not affect the ability of a designated entity to control a company, or diminish a designated entity financial stake in a venture, should not be considered in the definitional analysis for purposes of determining eligibility.

130. Discussion. In the Second Report and Order, we stated that publicly traded minority and women-owned companies would not be eligible for provisions applicable to these designated entities. In the Fifth Report and Order, however, we deviated from this restriction to allow publicly traded minority and women-owned companies to qualify to bid in the entrepreneurs' block, and under certain circumstances to qualify for bidding credits.[178] We will continue to consider exceptions to our restriction on publicly traded company eligibility

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[176] Id. at ¶ 239.

[177] Fifth Report and Order at ¶¶ 137-139.

[178] See Fifth Report and Order at ¶¶ 163-164.